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Is Delaware's Antitakeover Statute Unconstitutional? Further Analysis and a Reply to Symposium Participants

Guhan Subramanian

Steven Herscovici

Brian Barbetta^{*}

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In an Article published in the May 2010 issue of the Business Lawyer, we examined Delaware doctrine and presented new evidence to conclude that the empirical claim that the federal courts relied upon to uphold Delaware's antitakeover statute against Supremacy Clause challenges is no longer valid, and that the constitutionality of Section 203 is therefore "up for grabs." In this brief Reply, we respond to five commentaries on our Article, written by prominent corporate law practitioners and academics. Among other points, we re-examine the sample that supported the constitutionality of Section 203 (n=17) to find that not a single one of these bids actually gave bidders a "meaningful opportunity for success" on a hostile basis, as the federal courts held that the Supremacy Clause requires. Taken together, these further findings confirm our view that Section 203 is vulnerable to constitutional attack.

^{*} Harvard University, Analysis Group, & Analysis Group, respectively. The authors thank the corporate lunch group at Harvard Law School for helpful discussions and Nithya Sharma for excellent research assistance.

In our main Article published in this issue,¹ we make three straightforward points:

1. Three federal district courts held in 1988 that Delaware's antitakeover statute must give bidders a "meaningful opportunity for success" in order to be valid under the Supremacy Clause of the U.S. Constitution.²
2. These three courts upheld Section 203 because the empirical evidence available at the time appeared to show that bidders were able to achieve an 85% tender on a hostile basis reasonably often, but these courts left open the possibility that future empirical evidence could change this constitutional conclusion.³
3. No bidder in the past nineteen years has been able to achieve 85% in a hostile tender offer against a Delaware target.⁴

We conclude from these points that:

[T]he empirical claim that the federal courts have relied upon to uphold Section 203's constitutionality is no longer valid. It seems possible that the federal courts would uphold the constitutionality of Section 203 on different grounds. But at the very least the constitutionality of Section 203 would seem to be up for grabs.⁵

We thank *The Business Lawyer* for soliciting five excellent commentaries on our Article. The commentators are all well-known and well-respected practitioners and academics, and at least two of them were involved in the debates that led to the passage of Section 203 in 1988: Gil Sparks was the chairman of the Corporation Law Section of the Delaware Bar Association at the time, and Gregg Jarrell was a vocal opponent of the legislation as it went through the Delaware legislature. We thank all the commentators for their insights.

Some commentators, inside this issue and elsewhere, agree with our core conclusion noted above. Professor Joe Grundfest of Stanford Law School states, "Lawyers now have the data they need to renew a constitutional battle over these

¹ Guhan Subramanian, Steven Herscovici & Brian Barbetta, *Is Delaware's Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 BUS. LAW. ____ (2010) [hereinafter SHB].

² *Id.* at ____.

³ *Id.* at ____.

⁴ *Id.* at ____.

⁵ *Id.* at ____.

sorts of state takeover laws.”⁶ Professor Steve Bainbridge of UCLA Law School writes, “I agree that the article’s data calls into question the empirical grounding of the Delaware trilogy. To that extent, I agree that the validity of the Delaware statute could be challenged.”⁷ Richard Hall, a partner at Cravath, Swaine & Moore offers, “Almost no one gets an 85% vote on anything that is opposed by management. If that’s the factual underpinning for 203, then [Subramanian, Herscovici & Barbetta are] probably right.”⁸ And Professor Gregg Jarrell, formerly the Chief Economist at the SEC, notes in this issue, “Now, nearly twenty years later, the jury is in. Apparently, Section 203 has made it virtually impossible for a hostile bidder to succeed without first convincing target management to embrace its offer.”⁹ Jarrell also presents interesting data showing a significant decline in hostile activity after the enactment of Section 203.¹⁰

Skadden Arps partner Eileen Nugent adds an important Wall Street perspective to the discussion. We agree with her introductory point that lawyers in 1988 probably understood the contours of Section 203’s constitutionality, but over time these nuances have been forgotten and all that is left is the bottom-line conclusion.¹¹ As Nugent points out, “[I]t always makes sense to go back and review the premise underlying an accepted approach, particularly when that reliance is of long standing and somewhat unquestioning.”¹² We also endorse her proposal that the Delaware legislature might consider clarifying that the 85% out should be assessed after any subsequent offering period in a tender offer.¹³

Others are more critical of our Article. As a starting point in assessing these claims, it is important to note that, with one potential caveat,¹⁴ none of our critics

⁶ Peter Lattman, Posting to *Wall Street Journal Deal Journal Blog*, <http://blogs.wsj.com/deals/2009/09/24/with-hostiles-on-the-rise-a-delaware-antitakeover-law-comes-under-scrutiny/> (Sept. 24, 2009, 11:35 AM EST) (“New Hostility for an Old Delaware Antitakeover Law”).

⁷ <http://www.professorbainbridge.com/professorbainbridge.com/2009/11/submaranian-replies-re-delaware-203-constitutionality.html> (Nov. 19, 2009, 1:22 AM EST) (“Subramanian Replies re Delaware 203 Constitutionality”). Like Professor Ribstein, Professor Bainbridge believes that a future court would nevertheless endorse the *Amanda Acquisition* approach. *See id.*

⁸ David Marcus, *Subramanian and Wachtell Square Off*, CORP. CONTROL ALERT, Dec. 2009, at 26, 26.

⁹ Gregg A. Jarrell, *A Trip Down Memory Lane: Reflections on Section 203 and Subramanian, Herscovici, and Barbetta*, 65 BUS. LAW. ___, ___, (2010).

¹⁰ *Id.* at ____.

¹¹ Eileen T. Nugent, *A Closer Look at DGCL Section 203*, 65 BUS. LAW. ___, ___, (2010).

¹² *Id.* at ____.

¹³ *See id.* at ____.

¹⁴ Steve Lamb and Jeff Gorris implicitly challenge our first point summarized above, arguing that the “meaningful opportunity for success” test comes from *BNS*, the first case in the Delaware trilogy, and that “later opinions [*Staley* and *Interco*] addressed the issue in a much more nuanced manner.” Stephen P. Lamb & Jeffrey M. Gorris, *A Practical Response to a Hypothetical Analysis*

question the three basic points that are summarized above. Instead, our critics speculate about how a future court might reconcile our experience under the statute with the Supremacy Clause of the U.S. Constitution. Gil Sparks and Helen Bowers argue that the friendly deal “out” would satisfy the constitutional requirement.¹⁵ Professor Larry Ribstein argues that fiduciary duty constraints on Section 203 would satisfy the constitutional requirement or, alternatively, that federal courts should and would rework their Supremacy Clause jurisprudence to accommodate Section 203.¹⁶ Steve Lamb and Jeffrey Gorris argue that “the viability of the meaningful opportunity for success test is less than certain” because of decisions in the Seventh and Fourth Circuits rejecting the test.¹⁷ Some argue that our experience under the statute over the past twenty years should be ignored because of the solidification of the poison pill.¹⁸

of Section 203's Constitutionality, 65 BUS. LAW. ___, ___ (2010) . While Lamb and Gorris are correct that the *Staley* and *Interco* courts discussed certain nuances in dicta, these courts squarely endorsed the “meaningful opportunity for success” test established in *BNS*. See *RP Acquisition Corp. v. Staley Cont'l, Inc.*, 686 F. Supp. 476, 482 (D. Del. 1988) (“The crucial inquiry . . . is whether hostile offers still have a meaningful opportunity for success”); *City Capital Assocs. Ltd. P'ship v. Interco, Inc.*, 696 F. Supp. 1551, 1555 (D. Del. 1988) (“This Court is persuaded that the analysis and rationale applied in those prior cases [*BNS* and *Staley*] with regard to the Williams Act preemption claims and the Commerce Clause claims were correct and thus adopts them here.”). See also *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 508 (7th Cir. 1989) (“The three district judges who have considered and sustained Delaware's law delaying mergers did so in large measure because they believed that the law left hostile offers ‘a meaningful opportunity for success.’”).

¹⁵ See A. Gilchrist Sparks, III & Helen Bowers, *After Twenty-Two Years, Section 203 of the Delaware General Corporation Law Continues to Give Hostile Bidders a Meaningful Opportunity for Success*, 65 BUS. LAW. ___, ___ (2010) (presenting extensive data showing that hostile bids are sometimes completed as friendly deals). Sparks and Bowers assert that our exclusion of deals that turned friendly before the expiration of the initial tender offer is a “sleight-of-hand.” See *id.* at ___. In fact, we discuss this methodological point extensively in our Article. See SHB, *supra* note 1, at ___. In a similar mode of attack, Sparks and Bowers assert that our recommendation for a 70% out “appears to have been selected from pure air.” See Sparks & Bowers, *supra*, at ___. In fact, we explain our reasons for this proposed threshold in our Article. See SHB, *supra* note 1, at

¹⁶ See Larry E. Ribstein, *Preemption as Micromanagement*, 65 BUS. LAW. ___ (2010).

¹⁷ See Lamb & Gorris, *supra* note 14, at ___. The fact that practitioners cite the Delaware trilogy as if these cases are good law is inconsistent with Lamb and Gorris's claim. See, e.g., MARTIN LIPTON & ERICA H. STEINBERGER, TAKEOVERS & FREEZEOUTS § 5.03[2][c][ii][a] (Supp. 2009) (noting the cases in the Delaware trilogy as if they are good law); ARTHUR FLEISCHER, JR. & ALEXANDER R. SUSSMAN, TAKEOVER DEFENSE § 4.05[A] (2004) (same). In any event, if the Delaware trilogy is in fact no longer good law, that conclusion only serves to prove our point that the constitutionality of Section 203 is “in play.”

¹⁸ See Lamb & Gorris, *supra* note 14, at ___; Sparks & Bowers, *supra* note 15, at ___.

We assess these arguments in our original Article,¹⁹ so we will not repeat those points here. Instead, we address four new possibilities that have been raised in this Symposium.

First, Professor Ribstein argues that “[i]t would be inconsistent with [the Delaware trilogy’s] reliance on the legislature’s judgment to invalidate the statute based on circumstances arising after the legislature had applied its judgment.”²⁰ We know of no principle in constitutional law, nor does Ribstein offer one, suggesting that when the legislature makes a constitutional assessment, and a court later acknowledges that assessment, the constitutional question becomes untouchable. Ribstein states that courts “did not necessarily contemplate that plaintiffs could return to court more than a generation after the [Delaware trilogy],”²¹ but this is precisely what the Delaware trilogy envisioned.²² It should be remembered that Delaware passed its first antitakeover statute in 1976 and took it off the books in 1987 because it was likely unconstitutional. It is not obvious why Ribstein’s hypothesized statute of limitations on constitutional claims should run longer than eleven years but shorter than twenty-two.

Lamb and Gorris challenge our argument that the pill has been weakened in recent years, arguing that the constitutionality of Section 203 is irrelevant because the pill is the binding constraint in hostile takeovers.²³ In fact, the most recent evidence suggests that we understated the decline of the pill. In an article entitled *US Takeover Defences Come Tumbling Down*, the *Financial Times* reports that only 28% of S&P 1500 companies had pills in 2009, a continued decline from the

¹⁹ See SHB, *supra* note 1, at ____.

²⁰ Ribstein, *supra* note 16, at ____.

²¹ *Id.* at ____.

²² See SHB, *supra* note 1, at ____ (citing relevant cases). Professor Ribstein also states that “SHB suggest that the poison pill itself avoids preemption.” Ribstein, *supra* note 16, at _____. We do not suggest this in our Article; therefore the “attempted distinction” between Section 203 and the pill that Ribstein criticizes, *id.* at _____, is not a distinction that we try to make. Ribstein then criticizes our Section 203 analysis because (he argues) if it were correct it would call into question defenses of unquestioned constitutional validity, such as the staggered board. See *id.* at _____. In fact, there is a natural distinction between transactional defenses, such as Section 203 and the pill, and other corporate governance provisions, such as the staggered board. See, e.g., *CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 69, 99 (1987) (White, J., dissenting) (describing the “fundamental distinction” between transactional defenses such as the Indiana antitakeover statute and other corporate governance provisions, such as cumulative voting and staggered boards).

²³ Lamb & Gorris, *supra* note 14, at _____. The argument is particularly interesting because Steve Lamb has previously expressed puzzlement about the Delaware Supreme Court’s endorsement of the flip-over pill in *Moran v. Household International, Inc.*, 500 A.2d 1346, 1357 (Del. 1985). See *A Household Name*, M&A J., _____, 2006, at 15, 20 (“Looking back on the Household fight, Mr. Lamb was still wondering how it could be that the directors of one company can be allowed [to] send their own shareholders to plunder the stock of another company at a discounted price that they unilaterally determine in advance. He rolled his eyes and smiled: ‘I just don’t know.’”).

54% incidence in 2005 and 37.5% incidence in 2007 that we reported in our original Article.²⁴ Wachtell, Lipton, Rosen & Katz, the inventor of the poison pill, nevertheless points to the recent decision in *Selectica, Inc. v. Versata Enterprises, Inc.*²⁵ as evidence that the pill is alive and well.²⁶ In this case, the Delaware Chancery Court upheld the use of a pill to protect a target company's net operating losses (NOLs).²⁷ However, pill doctrine is only relevant for companies that have pills, and nearly three-quarters of major U.S. companies currently do not.²⁸ More important, *Selectica* focuses on the ability of a board to use a pill once a threat has been identified (in that case, the loss of NOLs). *Selectica* does not change the fact that the board must identify a threat before being able to take defensive measures.

Next, Sparks and Bowers argue that the “the Jarrell analyses . . . remain the only direct evidence of the ability . . . to achieve the 85% threshold.”²⁹ Since submitting the final version of our Article to *The Business Lawyer*, we have had an opportunity to examine the data that Sparks and Bowers rely upon in their constitutional assessment.³⁰ Out of the thirty-one deals in Professor Jarrell's final sample that are classified as beginning and ending hostile, seventeen reached the 85% threshold.³¹ This 55% success rate for hostile bidders was the statistic that the *Interco* and *Staley* courts used to conclude that Section 203 gives bidders a “meaningful opportunity for success.”³²

²⁴ Helen Thomas, *US Takeover Defences Come Tumbling Down*, FIN. TIMES, Mar. 11, 2010, at 14 (citing latest statistics from RiskMetrics).

²⁵ C.A. No. 4241-VCN, 2010 WL 703062 (Del. Ch. Feb. 26, 2010).

²⁶ See Theodore N. Mervis, Eric S. Robinson, William Savitt & Ryan McLeod, *Delaware Upholds 4.99% Rights Plan to Protect NOLs* (Wachtell, Lipton, Rosen & Katz, New York, N.Y.), Mar. 1, 2010, at 2 (on file with *The Business Lawyer*) (“The [*Selectica*] decision constitutes a powerful rejoinder to those who have claimed that the pill has been weakened in recent years by newly emerging fiduciary constraints”). But see Posting by Steve M. Davidoff to *New York Times DealBook Blog*, <http://dealbook.blogs.nytimes.com/2010/03/02/delaware-broadens-standards-for-poison-pills/#more-187323> (Mar. 2, 2010, 1:31 PM EST) (“Delaware Broadens Standards for Poison Pills”) (arguing that Wachtell's statement “ignores the structure of our capital markets and the role of activist shareholders and proxy contests”).

²⁷ *Selectica*, 2010 WL 703062, at *25.

²⁸ See *supra* note 24 and accompanying text. Although companies continue to have the legal ability to put in a pill after a bid is launched, we believe that the decline in pill incidence is meaningful for reasons that we describe in our Article. See SHB, *supra* note 1, at ____ & n.____.

²⁹ See Sparks & Bowers, *supra* note 15, at ____.

³⁰ We thank Professor Gregg Jarrell for making this data available to us.

³¹ See Affidavit of Dr. Gregg A. Jarrell at 13, *City Capital Assocs. Ltd. P'ship v. Interco, Inc.*, 696 F. Supp. 1551 (D. Del. 1988) (Civ. A. No. 88-424 (JJF)) [hereinafter Jarrell *Interco* Affidavit].

³² See *RP Acquisition Corp. v. Staley Cont'l, Inc.*, 686 F. Supp. 476, 482–83 (D. Del. 1988) (“55 percent (16 out of 29) of the hostile tender offers reached 85 percent share holdings. . . . Interpreting the same information as Dr. Jarrell did, the S.E.C. concludes at most 50 percent (13 out of 26) of the hostile tender offers reached 85 percent share holdings. These percentages

Table 1 provides a breakdown of the seventeen successful bids in Professor Jarrell's sample. It shows that five bidders already held significantly more than 15% at the time of the tender offer, which means that these bids would not have qualified for the 85% out.³³ It is not surprising that these bidders were able to achieve 85% because they had virtual control (32–49%) before initiating their tender offers. Two bids were competing offers, and so also would not have been subject to Section 203.³⁴ Four bids were friendly from the outset and three more were approved by the target board prior to reaching the 85% hurdle, so all seven were incorrectly coded as hostile-to-the-end offers.³⁵ In the three remaining bids, the target boards were formally neutral or remained passive on the offer, and so these bids were also not hostile in the traditional sense.³⁶

undercut plaintiff's own argument and indicate hostile offers will have a 'meaningful opportunity for success' under the 85 percent exception."); *Interco*, 696 F. Supp. at 1555 (noting "updated version" of statistics presented in *Staley* but concluding that the data "has not changed significantly").

³³ Professor Jarrell notes the same point in his reports, *see, e.g.*, Jarrell *Interco* Affidavit, *supra* note 32, at 13, but this quite reasonable basis for exclusion was ignored by the *Staley* and *Interco* courts.

³⁴ *See* DEL. CODE ANN. tit. 8, § 203(b)(6) (2001) (exempting offers against target companies that have previously signed a merger agreement with a third party). Even if these two bids were not exempted from Section 203 as a formal matter, they do not provide evidence on the viability of the 85% out because the tender decision is significantly different in an end-game situation with competing bidders. In the famous bidding contest for Revlon, for example, after the Delaware Supreme Court concluded that the sale of the company was "inevitable" and enjoined the Revlon board's defensive mechanisms that thwarted an auction, 92% of Revlon shareholders unsurprisingly chose Perelman's \$58 cash per share when the alternative was Forstmann Little's \$57.25 cash. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 185 (Del. 1986). Additionally, in *Atlantic Oil*, the board reversed its stance against the Stephens tender offer and stated that the revised offer represented "an acceptable price." *See Stephens Unit Raises Bid for Atlantic Oil to \$12 a Share*, DOW JONES NEWS SERVICE, Jan. 21, 1983.

³⁵ In six of these bids, the incumbent board approved the offer. In the seventh bid (R&R Metal's tender offer for Vulcan Packaging), R&R replaced the incumbent board with its own nominees on June 28, 1988, *see* George Brett, *Gracious in Defeat, Cavan Leaves Vulcan*, TORONTO STAR, June 29, 1988, at B1, and closed its tender offer for 87.9% of the Vulcan shares on July 19.

³⁶ Among these three, the Mesa Royalty Trust bid was closer to friendly than neutral. The deal involved a repurchase of a spinoff from Mesa Petroleum, T. Boone Pickens's acquisition vehicle. Pickens told the press: "It's such a nice deal; we can acquire this without making anybody's management mad at us." Charles F. McCoy, *Mesa Seeks to Repurchase Royalty Trust at \$35 a Unit as Pickens Reverses Stance*, WALL ST. J., May 16, 1984, at 1. Thomson Financial also codes the Mesa Royalty deal as "Friendly." In Citicorp's bid for Quotron Systems, Quotron Chairman Milton E. Mohr said that although the board believed the price was inadequate, "[i]t would not be in the shareholders' interest for the company to take actions which might prevent the Quotron shareholders from making their own determinations as to the adequacy of the offer and the desirability of tendering their stock for \$19 a share." *See* Bill Sing, *Quotron Says It Won't Fight Citicorp Bid*, L.A. TIMES, May 28, 1986, at 3. According to analysts, "[a] Quotron decision not to oppose Citicorp was likely to guarantee that the offer would succeed." *Id.* In the third bid in this

This analysis leads to a striking conclusion: not a single bid that the federal district courts relied upon to conclude that the 85% out gives bidders a “meaningful opportunity for success” on a hostile basis actually stands for that proposition. If this is the evidence that Sparks and Bowers wish to rely upon, Section 203 would seem to be on shaky constitutional footing.

Finally, Lamb and Gorris suggest that a future court would only look at the data from 1988–1989 to determine whether Section 203 gives bidders a “meaningful opportunity for success.”³⁷ Among the various arguments that have been put forward, we believe that this is the strongest argument that would reconcile the doctrine with the data. But the important point is this: none of these arguments, including the Lamb and Gorris argument, have been endorsed by any court. Our critics over-read our Article to claim that the data mandates unconstitutionality, when all we say is that the data refutes the empirical claim that has until now supported constitutionality. The fact that critics of our Article speculate about what a court might do to find Section 203 constitutional proves our point that the constitutionality of Section 203 is “in play.”

An Illustration

To see this point more precisely, consider an all-cash, any-and-all, fully financed hostile takeover bid for a Delaware company that has not opted out of Section 203. To make the bidder’s legal position stronger (though the hypothetical does not turn on this fact), assume that the target has a large non-officer shareholder (like David Duffield at PeopleSoft), thereby making the effective bar for utilizing the 85% out something like 95%. The bidder challenges the constitutionality of Section 203 in federal district court. The target responds that the constitutionality of Section 203 is well-settled law, citing the *Koppers*, *Staley*, and *Interco* trilogy.³⁸ As Nugent describes, a well-counseled bidder would respond that these cases relied on an empirical proposition that is no longer valid, if it ever was.³⁹ With this straightforward and uncontested point, the court would be in open terrain.

The court hearing the case would first have to determine the appropriate test under the Supremacy Clause. The court might endorse the *Amanda Acquisition* approach, which essentially imposes no Supremacy Clause constraint on state

category (Cannon Mills), the target board was formally neutral. See *Cannon Mills ‘Remains Neutral’ on Takeover Offer*, DOW JONES NEWS SERVICE, Jan. 20, 1982.

³⁷ See Lamb & Gorris, *supra* note 14, at ____.

³⁸ See *BNS Inc. v. Koppers Co.*, 683 F. Supp. 458 (D. Del. 1988); *RP Acquisition Corp. v. Staley Cont’l, Inc.*, 686 F. Supp. 476 (D. Del. 1988); *City Capital Assocs. Ltd. P’ship v. Interco, Inc.*, 696 F. Supp. 1551 (D. Del. 1988).

³⁹ See Nugent, *supra* note 11, at ____.

regulation of takeovers.⁴⁰ Alternatively, the court might follow the three prior district court judges who examined Section 203 to endorse the “meaningful opportunity for success” test.⁴¹ For reasons described in our Article, we believe that the latter approach is more likely, but the important point is that neither choice is mandated by existing law.

If the court endorses the “meaningful opportunity for success” test, the question becomes: does Section 203 give bidders a meaningful opportunity for success? The court might hold that some combination of the friendly deal “out” and fiduciary duty constraints on Section 203 give bidders a meaningful opportunity for success, although, as we point out in our Article, either of these reconciliations would be inconsistent with the Delaware trilogy’s emphasis on the viability of the 85% out as well as other Delaware precedent.⁴² Alternatively, the court might operate within the framework set out by the Delaware trilogy to hold that the constitutionality of Section 203 turns on the viability of the 85% out. Again, neither approach is mandated by existing law.

If the court chooses to operate within the framework set out by the Delaware trilogy, the court must then decide whether the 85% out gives bidders a meaningful opportunity for success. On this question, we highlight an important shift in the debate since 1988. Today, no one argues that achieving 85% on a hostile basis is easy, as observers claimed back then.⁴³ Instead, the debate today is whether getting to 85% is “difficult” or “close to impossible.” How might a court resolve this question? One possibility would be to look at the evidence that we offer from the past twenty years. A second possibility would be to examine only the evidence from 1988–1989, as Lamb and Gorris suggest. A third possibility, not necessarily mutually exclusive, would be to accept expert witness testimony from experienced practitioners on whether achieving 85% on a hostile basis is “difficult” or “close to impossible” today. Whatever approach the court takes, the constitutionality of Section 203 is in play. And of course, the constitutional question becomes easier to answer as the effective hurdle for getting to 85% becomes higher (say 95%), as posited in our hypothetical.

The Likelihood of Reform

In his commentary, Professor Jarrell warns us against “getting too emotionally invested in [our] efforts to alter Section 203” because such efforts are “doomed to

⁴⁰ See *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989).

⁴¹ See *Koppers*, 683 F. Supp. at 469; *Staley*, 686 F. Supp. at 482; *Interco*, 696 F. Supp. at 1555.

⁴² See SHB, *supra* note 1, at ____ & n. ____.

⁴³ See *id.* at ____.

fail.”⁴⁴ We wish to be clear that we are making a doctrinal and empirical argument, not engaging in an emotional crusade. In fact, we take no position in our Article as to whether the elimination of Section 203 would be good or bad as a policy matter. As to whether our point is “doomed to fail,” we acknowledge that there are powerful vested interests, in Delaware and elsewhere, for keeping Section 203 in place. However, we also believe that Delaware corporate law is at an interesting and unprecedented moment. Congress has already federalized significant aspects of corporate law with the Emergency Economic Stabilization Act of 2008,⁴⁵ the American Reinvestment and Recovery Act of 2009,⁴⁶ and (going back) the Sarbanes-Oxley Act of 2002.⁴⁷ The Dodd bill and the Schumer bill currently pending in Congress would go even further.⁴⁸ The SEC’s shareholder access proposal,⁴⁹ the wave of majority voting proposals, and the NYSE’s policy change on broker voting of discretionary shares⁵⁰ are all manifestations of the belief that boards need to be more responsive to shareholder interests. Hostile bidders are no longer the pariahs that they were in the 1980s. And finally, although we are not experts in the intricacies of U.S. Supreme Court politics, we note that only two Justices who decided *CTS* are still on the Court, with one of them (Scalia) siding with the majority⁵¹ and the other (Stevens) joining a three-Justice dissent on the preemption claim.⁵²

In this environment, we believe that the Delaware legislature should reconsider whether it wishes to offer such substantial insulation from hostile

⁴⁴ See Jarrell, *supra* note 9, at ____.

⁴⁵ Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered sections of 12 U.S.C.A.).

⁴⁶ Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of 6, 19, 26, 42 & 47 U.S.C.A.).

⁴⁷ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 & 29 U.S.C.).

⁴⁸ See Jim Kuhnhehn, *Dodd Puts Wall Street in Washington’s Sights*, MSNBC.COM, Mar. 16, 2010, http://www.msnbc.msn.com/id/35872652/ns/business-stocks_and_economy/ (discussing Dodd’s updated financial reform bill, unveiled in the Senate on March 15, 2010); Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. (2009) (Schumer bill).

⁴⁹ Facilitating Shareholder Director Nominations, Exchange Act Release No. 34-60089, 74 Fed. Reg. 29024 (proposed June 18, 2009) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249 & 274).

⁵⁰ See Self-Regulatory Organizations; New York Stock Exchange, LLC, Exchange Act Release No. 34-60215, 74 Fed. Reg. 33293, 33293 (July 10, 2009) (approving the NYSE’s proposal to amend Rule 452 “to eliminate broker discretionary voting for all elections of directors at shareholder meetings held on or after January 1, 2010”).

⁵¹ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment).

⁵² *Id.* at 98–99 (White, J., dissenting) (“[I]t is clear to me that Indiana’s scheme conflicts with the Williams Act’s careful balance, which was intended to protect individual investors and permit them to decide whether it is in their best interests to tender their stock. . . . The Control Share Acquisitions Chapter will effectively prevent minority shareholders in some circumstances from selling their stock to a willing tender offeror. It is the practical impact of the Chapter that leads to the conclusion that it is pre-empted by the Williams Act.”).

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takeovers as a matter of statutory law. We also continue to believe that if Delaware does not reconsider Section 203, the statute is vulnerable to constitutional attack.

Table 1: Bids Relied Upon in *Staley* and *Interco* to Conclude that Bidders Have a “Meaningful Opportunity for Success” on a Hostile Basis

Date Offer Began	Target	Bidder	Comments
6/17/1981	Treadway Cos.	Fair Lanes Inc.	Bidder owned 33.8% of outstanding shares prior to bid
11/1/1982	Juniper Petroleum Corp.	Damson Oil Inc.	Bidder owned 49.3% prior to bid
10/29/1984	Sonoma Vineyards	Renfield Corp.	Bidder owned 46.9% prior to bid
8/22/1985	SCM Corp.	Hanson Trust PLC	Bidder owned 32.4% prior to bid
1/7/1987	Booth Inc.	Household International Inc.	Bidder owned 44.8% prior to bid
1/20/1983	Atlantic Oil Corp.	Stephens Inc.	Jump bid—Section 203 not applicable
8/19/1985	Revlon Inc.	Pantry Pride Inc.	Jump bid—Section 203 not applicable
7/15/1981	Connecticut General Mortgage & Realty Investment Trust	Prudential Insurance Corp. of America	Friendly deal
8/25/1981	Walter Realty Investors Inc.	Seville Corp.	Friendly deal
11/15/1982	National Mobil Concrete Corp.	Chaucer Alliance Inc.	Friendly deal
11/18/1986	Guilford Industries Inc.	Debron Investments PLC	Friendly deal
9/12/1983	Northwest Energy Co.	Williams Co.	Board agreed to merger prior to 85% of shares being tendered
12/23/1983	Rampac Inc.	Pan-American Properties Inc.	Board agreed to merger prior to 85% of shares being tendered
5/25/1988	Vulcan Packaging Inc.	R&R Metal Products Ltd.	Board agreed to merger prior to 85% of shares being tendered
1/5/1982	Cannon Mills Co.	Pacific Holding Co.	Target board neutral on offer
5/18/1984	Mesa Royalty Trust	Mesa Petroleum Co.	Target board neutral on offer
5/22/1986	Quotron Systems Inc.	Citicorp Inc.	Target board remained passive on offer